



U.S. Department of Commerce  
National Oceanic and Atmospheric Administration



U.S. Environmental Protection Agency

Mr. Greg Aldrich, Acting Administrator  
Water Quality Division  
Department of Environmental Quality  
811 SW 6<sup>th</sup> Avenue  
Portland, OR 97204-1390

Ms. Patty Snow, Manager  
Oregon Coastal Management Program Department of Land, Conservation and Development  
635 Capitol Street, NE Suite 150  
Salem, OR 97301

Dear Mr. Aldrich,

The Environmental Protection Agency (EPA) and the National Oceanic and Atmospheric Administration (NOAA) have enclosed our initial assessment of Oregon's Implementation Ready (IR) TMDL approach for the Mid-Coast sub-basin and its ability to achieve and maintain water quality standards and enable Oregon Department of Environmental Quality (ODEQ) to satisfy the condition on its Coastal Nonpoint Program for additional management measures for forestry. This letter responds to the Final Settlement Agreement for Northwest Environmental Advocates v. Locke, et. al, Civil No. 09-0017-PK. Specifically, EPA and NOAA agreed to provide the ODEQ with an initial written assessment by December 31, 2012 on:

- whether implementation of the Oregon Coastal TMDL approach (now referred to as the Implementation-Ready or IR-TMDL approach), including safe-harbor best management practices (BMPs), in the Mid-Coast sub-basins is likely to result in actions that will achieve and maintain water quality standards (WQS); and
- whether ODEQ's plan for developing and updating TMDLs for all sub-basins in the Coastal Nonpoint Pollution Control Program (or Coastal Nonpoint Program) management area using the Implementation-Ready TMDL approach could satisfy the outstanding forestry condition on the state's Coastal Nonpoint Program.

EPA and NOAA have considered many documents in making our assessment, including comments the plaintiff. However, when EPA and NOAA negotiated this milestone in the settlement agreement, we did so on the assumption that DEQ would have completed the Mid-Coast TMDLs by June 30, 2012 in accordance with DEQ's July 21, 2010 commitment letter. That letter also states that other interim benchmarks. By January 31, 2011, ODEQ agreed to provide additional detail on the IR-TMDL process, including describing how the TMDL approach will address NOAA and EPA's concerns with landslide prone areas and road density and maintenance, and providing examples of the types of "safe harbor" BMPs Oregon would use to address our concerns about adequate protection of riparian and landslide-prone areas and management/maintenance of forestry roads and meet load allocations and surrogate targets. Yet,

to date, Oregon has not met the dates for additional detail on the IR-TMDL process or for completion of the Mid-Coast TMDLs. .

EPA and NOAA recognize the complexities of pursuing this new, innovative, IR-TMDL approach. To date, Oregon has held numerous stakeholder advisory and technical meetings, analyzed and presented information to support the temperature and sediment TMDLs, defined the geographic scope of the temperature and sediment TMDLs, and developed defensible sediment targets for 303(d) listings related to turbidity and biocriteria. These are all important steps for laying the groundwork for the next critical and essential element to meeting the Settlement Agreement - to determine the management measures that are necessary to meet water quality targets for sediment and temperature.

The original deadlines have slipped significantly. There has been limited progress on developing and identifying the best practices which are key to meeting both water quality standards and the outstanding coastal nonpoint program conditions. In order to meet the Settlement Agreement conditions, it is important that the analyses and discussion with stakeholders on the management measures needed to meet water quality standards begin as soon as possible.

Without a completed Mid-Coast TMDL that includes specific BMPs and a better understanding of how the TMDL process will address landslide prone and road issues, EPA and NOAA do not have sufficient information to conclude if the IR-TMDL approach would enable Oregon to achieve and maintain water quality standards or satisfy the additional management measures for forestry condition on its Coastal Nonpoint Program. Based on what we have been presented to date, we have concerns that the current approach would enable the state to achieve either goal.

The enclosed assessment document provides additional information on what EPA and NOAA feel are positive aspects of the IR-TMDL process, current shortcomings, and what Oregon needs to do to satisfy its remaining additional management measures for forestry condition and achieve and maintain water quality standards. We have also included feedback on Oregon's approach for satisfying the other two conditions on its Coastal Nonpoint Program related to new development and onsite sewage disposal systems.

According to the settlement agreement, EPA and NOAA must announce in the Federal Register our intent to fully approve or disapprove Oregon's Coastal Nonpoint Program by November 15, 2013. As we have shared with Oregon in the past, we must receive all information from Oregon satisfying its three remaining conditions by June 30, 2013, in order to meet this deadline. EPA and NOAA are very concerned that we will not be able to announce our intent to fully approve Oregon's program by the November 2013. If we must disapprove the state's program, the Coastal Zone Act Reauthorization Amendments requires NOAA and EPA to withhold 30 percent of Oregon's Coastal Zone Management Act Section 306 funding and Clean Water Act Section 319 program.

As we do not want to see the state lose critical funding that supports water quality and habitat protection, working with Oregon to achieve full approval of its Coastal Nonpoint Program continues to be a priority for NOAA and EPA. Both agencies will continue to work closely with DEQ to move its IR-TMDL effort forward expeditiously and to enable the state to meet the other remaining conditions on its Coastal Nonpoint Program.

Sincerely,

Margaret Davidson, Acting Director  
Office of Ocean and Coastal Resource  
Management  
National Oceanic and Atmospheric  
Administration

Daniel D. Opalski, Director  
Office of Water and Watersheds  
Environmental Protection Agency,  
Region 10

cc: Dick Pedersen, Director, DEQ  
Bill Blosser, Chair, EQC  
Gene Foster, Watershed Management Manager, DEQ  
Nina Bell, NWEA

**EPA and NOAA's Assessment of Oregon's Implementation-Ready TMDL Approach and the State's Progress in Addressing the Remaining Conditions on its Coastal Nonpoint Pollution Control Program**

***1) Will the Implementation of the Implementation-Ready TMDL, in the Mid-Coast Sub-basins Likely Result in Actions to Achieve and Maintain Water Quality Standards (WQS)?***

Based on what EPA and NOAA have been presented to date, we do not believe the coastal TMDL approach is likely to result in actions that achieve and maintain WQS. Oregon Department of Environmental Quality (DEQ) needs to develop mandatory and enforceable management measures (MMs) in the TMDLs that if implemented would result in meeting WQS. If ODEQ chooses to allow the Designated Management Agencies (DMAs) to develop the MMs, then DEQ needs to develop criteria for determining that the MMs submitted by the DMAs are adequate and a process DEQ would follow if the MMs are not adequate to meet WQS (what trigger would be used to require DEQ to develop MMs when necessary to meet WQS?).

[Add]

***2) Will Oregon's Plan Developing Implementation-Ready TMDLs throughout the Coastal Nonpoint Program Management Area using Satisfy the Outstanding Additional Management Measure for Forestry Condition on the State's Coastal Nonpoint Program?***

Based on what EPA and NOAA have been presented to date, we do not believe the coastal TMDL approach is likely to result to satisfy outstanding forestry conditions. Although the DEQ's conceptual road strategy has good potential, the strategy needs to have specifics fleshed out. EPA and NOAA are concerned about the lack of progress on MM's for riparian and landslide prone area protection and ODEQ's failure to consider nonfish streams in rulemaking. DEQ needs to include additional riparian MMs for both small and medium streams, for nonfish streams and for landslide prone areas in the TMDLs. . [Add]

***3) Feedback on the State's Progress in Meeting the New Development Condition on its Coastal Nonpoint Program***

To address its remaining condition for new development, DEQ has proposed to:

- develop guidance, consistent with the new development 6217 (g) management measure, for TMDL Implementation Plan Development for urban and rural residential areas within the coastal nonpoint program management area boundary; and
- provide a strategy and schedule for completing and updating TMDL Implementation Plans to be consistent with the new guidance.

In its July 2012 letter to EPA and NOAA, ODEQ committed to completing a final draft of the guidance by December 31, 2010, releasing the final guidance by June 30, 2011, and beginning to hold workshops for Designated Management Areas (DMAs) by June/July 2011. However, as of to date, ODEQ has yet to complete the guidance and the "final" draft EPA and NOAA reviewed in July 2012 still needed significant work.

While EPA and NOAA have been supportive of the potential of this approach for addressing the new development management measure requirements, we are very disappointed that the deadlines have slipped significantly. In addition, based on EPA and NOAA's review of the July 2012 "final" draft, *Guidance for TMDL Implementation Plan Development for Urban/Rural Residential Land Uses within the Coastal Nonpoint Management Area*, it is still unclear if the TMDL Implementation Plans developed would include practices consistent with the 6217(g) management measure for new development and if DEQ has the authority to require implementation of the new development management measure, as needed (see comments EPA and NOAA provided to DEQ by email on July 23, 2012). This gives us concern that this TMDL Implementation Plan Guidance for urban areas may not enable Oregon to satisfy its new development condition.

As ODEQ finalizes this guidance, it needs to make sure the guidance provides clear instruction to the DMAs that practices consistent with the new development management measure need to be incorporated into their Implementation Plans (i.e., practices that will reduce post-development total suspended solid (TSS) loadings by 80% or reduce TSS loadings so that the average annual TSS loads are no greater than predevelopment loadings, and maintain post-development peak runoff rate and average volume to pre-development levels). The guidance also needs to clearly indicate that DEQ can ensure implementation of the new development management measure, as needed.

It was EPA and NOAA's understanding that the Implementation Guidance would require Urban DMAs to include practices consistent with the new development measure within their TMDL Implementation Plans, or at a minimum, DEQ would have the ability to require implementation of the recommended new development management measure. While states are able to use voluntary approaches backed by enforceable authorities to meet their Coastal Nonpoint Program requirements (see EPA and NOAA's 1998 *Final Administrative Changes Memo*) statements in the July final draft appear to contradict Oregon's September 23, 2005, legal opinion asserting that DEQ does have authority to require implementation of the 6217(g) measures as necessary to control nonpoint source pollution.

EPA and NOAA hope DEQ can expeditiously complete the *Guidance for TMDL Implementation Plan Development for Urban/Rural Residential Land Uses within the Coastal Nonpoint Management Area* and ensure that it clearly states that Urban DMAs need to include practices consistent with the new development measure and that DEQ has the ability to ensure implementation of these practices, as needed. We strongly encourage DEQ to share a revised final draft of the guidance with EPA and NOAA for review so we can confirm that these requirements are met or provide recommendations for how the draft can be improved further.

#### **4) *Feedback on the Oregon's Progress in Meeting the Onsite Sewage Disposal System Condition on its Coastal Nonpoint Program***

To address its remaining condition for OSDS, ODEQ has proposed to develop rules to require point of sale inspections for systems within the coastal nonpoint program boundary. EPA and NOAA applaud Oregon's progress on rule development and the fact that it was on target for meeting benchmarks in its July 2012 commitment letter. The proposed rules require

all OSDS within the coastal nonpoint program management area to be inspected by a professional engineer, registered environmental health specialist or wastewater specialist or a certified inspector at the time of property transfer and that those inspections be reported to ODEQ. The state has also provided a sample inspection form that provides for a detailed examination of the system beyond a simple visual inspection. The proposed rules requiring point of sale inspections and reliance on qualified inspectors, combined with the state's detailed inspection form, will enable the state to satisfy its OSDS condition when adopted.

EPA and NOAA are aware that ODEQ has decided to delay presenting the rules to the EQC for adoption until March 2013 to give them more time to discuss the proposed rules with several state legislatures. We recognize some additional time may be needed to address potential concerns. However, we strongly hope that the adoption of the proposed rules will not be delayed beyond the March. In addition, ODEQ must ensure that significant changes to the rules do not occur so that the rules would no longer enable Oregon to satisfy its remaining OSDS condition.



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- whether implementation of the Oregon Coastal TMDL approach (now referred to as the Implementation-Ready or IR-TMDL approach), including safe-harbor best management practices (BMPs), in the Mid-Coast sub-basins is likely to result in actions that will achieve and maintain water quality standards (WQS); and
- whether ODEQ's plan for developing and updating TMDLs for all sub-basins in the Coastal Nonpoint Pollution Control Program (or Coastal Nonpoint Program) management area using the Implementation-Ready TMDL approach could satisfy the outstanding forestry condition on the state's Coastal Nonpoint Program.

EPA and NOAA have considered many documents in making our assessment, including comments the plaintiff provided regarding the IR-TMDL for the Mid-Coast and BMPs. However, when EPA and NOAA negotiated this milestone in the settlement agreement, we did so on the assumption that DEQ would have completed the Mid-Coast TMDLs by June 30, 2012 in accordance with according to DEQ's July 21, 2010 commitment letter. That letter also states that other interim benchmarks. By January 31, 2011, such as ODEQ agreed to providing additional detail on the IR-TMDL process, including describing how the TMDL approach will address NOAA and EPA's concerns with landslide prone areas and road density and maintenance, and providing examples of the types of "safe harbor" BMPs Oregon would use to

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**Comment [AC1]:** The settlement agreement says we are to provide ODEQ an assessment. The remaining programs are all under DEQ's control so may be appropriate just to address the letter to DEQ and cc' OR CZM program in DLCD.

**Comment [AC2]:** Settlement agreement says we send copy to Plaintiff. Therefore, Nina get's a cc. Don't think we need to include plaintiff's counsel too but perhaps lawyers feel otherwise.

**Comment [AC3]:** The cover letter can convey a few main points but I think it would be best to leave a lot of the detail to an enclosure to keep the letter, itself, short and sweet.

**Comment [Don4]:** I agree the letter itself should be short and to the point, with the detail shunted to an attachment.

**Comment [JW5]:** I've changed all references to Oregon as ODEQ, since there are many state agencies involved in the TMDL, but only ODEQ that we're assessing.

**Comment [AC6]:** We may want to remove this date if we won't get the final letter out in time.

**Comment [JC7]:** Since ODEQ has not provided IR-TMDL or BMPs, NWEA has had no opportunity to comment on what has not been provided. They have expressed their concerns to us about the process, our interim decisions etc. Maybe we should keep this vague.

**Comment [AC8]:** Don't think we need to spell these out here. Our assessment should speak to them which will show that we have considered them. If we want, we could consider including an appendix listing all documents we considered as an enclosure and referencing that in the above sentence.

Also, we HAVE NOT considered the mid-coast TMDLs the state hasn't developed them yet. Our assessment needs to note this clearly that deadlines have slipped and we do not have the documents we believed we would at this point.

**Comment [Don9]:** Glad to see this sentence in here. It is important to go on record on this point.

address our concerns about adequate protection of riparian and landslide-prone areas and management/maintenance of forestry roads and meet load allocations and surrogate targets, ~~would have been achieved by January 31, 2011. Yet, to date, Oregon has not met the dates for additional detail on the IR-TMDL process or for completion of the Mid-Coast TMDLs. neither of these milestones have been met by Oregon.~~

~~EPA and NOAA recognize the complexities of pursuing this new, innovative, IR-TMDL approach. To date, While we applaud your Oregon's achievements including collecting ed and has beginning to analyze data necessary for the TMDL development, held numerous organizing and holding many stakeholder advisory and technical meetings, analyzed and presented information to support the temperature and sediment TMDLs, defined the geographic scope of the temperature and sediment TMDLs, and developed defensible sediment targets for 303(d) listings related to turbidity and biocriteria. These are all important steps for laying the groundwork for the next critical and essential element to meeting the Settlement Agreement - to determine the management measures that are necessary to meet water quality targets for sediment and temperature. and outlining promising approaches.~~

**Comment [JC10]:** Should we acknowledge the challenges with the temperature natural condition litigation?

**Comment [Don11]:** ?? is something missing here?

**Comment [Don12]:** outlining?

~~We are very disappointed that many of the original deadlines have slipped significantly. DEQ has yet to adequately complete the benchmarks noted above and does not anticipate completing the Mid Coast TMDLs until Summer 2013 or later. There has been limited progress on developing and identifying the best practices which are key to meeting both water quality standards and the outstanding coastal nonpoint program conditions. In order to meet the Settlement Agreement conditions, it is important that the analyses and discussion with stakeholders on the management measures needed to meet water quality standards begin as soon as possible.~~

**Comment [AC13]:** Add more specifics about the temp and sed. TMDLs? I'm not sure what the latest deadline is these days.

~~Therefore, without a completed Mid-Coast TMDL that includes specific BMPs and a better understanding of how the TMDL process will address landslide prone and road issues, EPA and NOAA do not have sufficient information to conclude if the IR-TMDL approach would enable Oregon to achieve and maintain water quality standards or satisfy the additional management measures for forestry condition on its Coastal Nonpoint Program. Based on what we have been presented to date, we have concerns that the current approach would enable the state to achieve either goal.~~

The enclosed assessment document provides additional information on what EPA and NOAA feel are positive aspects of the IR-TMDL process, current short-comings, and what ~~Oregon the state~~ needs to do to satisfy its remaining additional management measures for forestry condition and achieve and maintain water quality standards. We have also included feedback on Oregon's approach for satisfying the other two conditions on its Coastal Nonpoint Program related to new development and onsite sewage disposal systems.

According to the settlement agreement, EPA and NOAA must announce in the Federal Register our intent to fully approve or disapprove Oregon's Coastal Nonpoint Program by November 15, 2013. As we ~~ha~~-ve shared with ~~Oregon the state~~ in the past, we must receive all information from Oregon satisfying its three remaining conditions by June 30, 2013, in order to meet this deadline. EPA and NOAA are very concerned that we will not be able to announce our intent to fully approve Oregon's program by the November 2013. If we must disapprove the state's program,



the Coastal Zone Act Reauthorization Amendments requires NOAA and EPA to withhold 30 percent of Oregon's Coastal Zone Management Act Section 306 funding and Clean Water Act Section 319 program.

As we do not want to see the state lose critical funding that supports water quality and habitat protection, working with Oregon to achieve full approval of its Coastal Nonpoint Program continues to be a priority for NOAA and EPA. Both agencies will continue to work closely with DEQ to move its IR-TMDL effort forward expeditiously and to enable the state to meet the other remaining conditions on its Coastal Nonpoint Program.

**Comment [AC14]:** Some of these points may be better integrated into the enclosure.

Sincerely,

Margaret Davidson, Acting Director  
Office of Ocean and Coastal Resource  
Management  
National Oceanic and Atmospheric  
Administration

Daniel D. Opalski, Director  
Office of Water and Watersheds  
Environmental Protection Agency,  
Region 10

**Comment [AC15]:** I think she would be Daniel's equivalent.

cc: Dick Pedersen, Director, DEQ  
Bill Blosser, Chair, EQC  
Gene Foster, Watershed Management Manager, DEQ  
Nina Bell, NWEA

**EPA and NOAA's Assessment of Oregon's Implementation-Ready TMDL Approach and the State's Progress in Addressing the Remaining Conditions on its Coastal Nonpoint Pollution Control Program**

**1) Will the Implementation of the Implementation-Ready TMDL, in the Mid-Coast Sub-basins Likely Result in Actions to Achieve and Maintain Water Quality Standards (WQS)?**

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[Add]

**Comment [JC16]:** Jenny/Helen/Alan: Please expand on what EPA/NOAA believe is still needed and critical for making a determination that the approach would meet WQS.

**Comment [Don17]:** Suggest something like: "Not in its current framework..."

**2) Will Oregon's Plan Developing Implementation-Ready TMDLs throughout the Coastal Nonpoint Program Management Area using Satisfy the Outstanding Additional Management Measure for Forestry Condition on the State's Coastal Nonpoint Program?**

Based on what EPA and NOAA have been presented to date, we do not believe the coastal TMDL approach is likely to result to satisfy outstanding forestry conditions. Although the DEQ's conceptual road strategy has good potential, the strategy needs to have specifics fleshed out. EPA and NOAA are concerned about the lack of progress on MM's for riparian and landslide prone area protection and ODF's failure to consider nonfish streams in rulemaking. DEQ needs to include additional riparian MMs for both small and medium streams, for nonfish streams and for landslide prone areas in the TMDLs.

[Add]

**Comment [JC18]:** Dave: Please expand on what EPA/NOAA believe is still needed and critical for making a determination that the approach would satisfy outstanding forestry conditions.

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**Comment [Don19]:** Suggest something like: "Not in its current framework..."

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To address its remaining condition for new development, ODEQ has proposed to:

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In its July 2012 letter to EPA and NOAA, ODEQ committed to completing a final draft of the guidance by December 31, 2010, releasing the final guidance by June 30, 2011, and beginning to hold workshops for Designated Management Areas (DMAs) by June/July 2011. However, as of to date, ODEQ has yet to complete the guidance and the "final" draft EPA and NOAA reviewed in July 2012 still needed significant work.

While EPA and NOAA have been supportive of the potential of this approach for addressing the new development management measure requirements, we are very disappointed that the deadlines have slipped significantly. In addition, based on EPA and NOAA's review of the July 2012 "final" draft, *Guidance for TMDL Implementation Plan Development for Urban/Rural Residential Land Uses within the Coastal Nonpoint Management Area*, it is still unclear if the TMDL Implementation Plans developed would include practices consistent with the 6217(g) management measure for new development and if ODEQ has the authority to require implementation of the new development management measure, as needed (see comments EPA and NOAA provided to ODEQ by email on July 23, 2012). This gives us concern that this TMDL Implementation Plan Guidance for urban areas may not enable Oregon to satisfy its new development condition.

**Comment [AC20]:** Add something about extent of TMDLs and types?

As ODEQ finalizes this guidance, it needs to make sure the guidance provides clear instruction to the DMAs that practices consistent with the new development management measure need to be incorporated into their Implementation Plans (i.e., practices that will reduce post-development total suspended solid (TSS) loadings by 80% or reduce TSS loadings so that the average annual TSS loads are no greater than predevelopment loadings, and maintain post-development peak runoff rate and average volume to pre-development levels). The guidance also needs to clearly indicate that ODEQ can ensure implementation of the new development management measure, as needed.

It was EPA and NOAA's understanding that the Implementation Guidance would require Urban DMAs to include practices consistent with the new development measure within their TMDL Implementation Plans, or at a minimum, ODEQ would have the ability to require implementation of the recommended new development management measure. While states are able to use voluntary approaches backed by enforceable authorities to meet their Coastal Nonpoint Program requirements (see EPA and NOAA's 1998 *Final Administrative Changes Memo*) statements in the July final draft appear to contradict Oregon's September 23, 2005, legal opinion asserting that ODEQ does have authority to require implementation of the 6217(g) measures as necessary to control nonpoint source pollution.

EPA and NOAA hope ODEQ can expeditiously complete the *Guidance for TMDL Implementation Plan Development for Urban/Rural Residential Land Uses within the Coastal Nonpoint Management Area* and ensure that it clearly states that Urban DMAs need to include practices consistent with the new development measure and that ODEQ has the ability to ensure implementation of these practices, as needed. We strongly encourage ODEQ to share a revised final draft of the guidance with EPA and NOAA for review so we can confirm that these requirements are met or provide recommendations for how the draft can be improved further.

#### **4) Feedback on the Oregon's Progress in Meeting the Onsite Sewage Disposal System Condition on its Coastal Nonpoint Program**

To address its remaining condition for OSDS, ODEQ has proposed to develop rules to require point of sale inspections for systems within the coastal nonpoint program boundary. EPA and NOAA applaud Oregon's progress on rule development and the fact that it was on target for meeting benchmarks in its July 2012 commitment letter. The proposed rules require

all OSDS within the coastal nonpoint program management area to be inspected by a professional engineer, registered environmental health specialist or wastewater specialist or a certified inspector at the time of property transfer and that those inspections be reported to ODEQ. The state has also provided a sample inspection form that provides for a detailed examination of the system beyond a simple visual inspection. The proposed rules requiring point of sale inspections and reliance on qualified inspectors, combined with the state's detailed inspection form, will enable the state to satisfy its OSDS condition when adopted.

EPA and NOAA are aware that ODEQ has decided to delay presenting the rules to the EQC for adoption until March 2013 to give them more time to discuss the proposed rules with several state legislatures. We recognize some additional time may be needed to address potential concerns. However, we strongly hope that the adoption of the proposed rules will not be delayed beyond the March. In addition, ODEQ must ensure that significant changes to the rules do not occur so that the rules would no longer enable Oregon to satisfy its remaining OSDS condition.

**Comment [Don21]:** Good addition.